SUPREME COURT, U. S.
MAR 23 1974
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-984

THE WICHITA INDIAN TRIBE OF OKLAHOMA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

REPLY AND SUPPLEMENTAL BRIEF FOR THE WICHITA INDIAN TRIBE OF OKLAHOMA, ET AL., PETITIONERS

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TABLE OF CONTENTS

	Page
Reply and Supplemental Brief for the Wichita Indian Tribe of Oklahoma, et al., Petitioners	1
APPENDIX A - -Order to Show Cause Why A Final Judgment May Not Be Entered .	1a
APPENDIX B- - An Excerpt From Hodgson v. United Mine Workers of America, 473 F.2d 118 (1972).	1b
APPENDIX C - -Excerpts From American Pipe and Construction Co., Et Al., v. State of Utah, et al., 94 S. Ct. 756, Decided January 16, 1974, and Fully Reported in 42 LW 4155-4163. . .	1c

Cases:

American Pipe Line Construction Co., et al. v. State of Utah, et al., 94 S. Ct. 756, 42 LW 4155 . .	6,7
Harrisburg v. Rickards, 119 U.S. 199.	7

Hodgson v. United Mine Workers, 473 F.2d 118 (1972) 3

Lipan Apache v. United States, 22 Ind. Cl. Comm 1 (1969) 2

United States vs. Kiowa, Comanche and Apache Tribes of Indians, 479 F.2d 1369 (1973) 8

United States vs. State of La., 1957, 77 S.Ct. 1373, 354 U.S. 515, 1 L. Ed 2d 1525 10

United States ex rel Texas Portland Cement Company v. McCord, 233 U.S. 157 (1914) 5

Miscellaneous:

Federal Rules of Civil Procedure, 28 U.S.C. Rule 21. 10

Federal Rules of Civil Procedure, 28 U.S.C. Rule 54 (b) 4

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-984

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND BANDS AND GROUPS OF INDIANS WHICH HAVE BEEN OR WHICH ARE AFFILIATED WITH THE WICHITA INDIAN TRIBE OF OKLAHOMA, INCLUDING BUT NOT LIMITED TO THE WICHITA, WACOS, KEECHIS, AND TOWACONIES,

Petitioners,

v.

THE UNITED STATES OF AMERICA, AND THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY AND SUPPLEMENTAL BRIEF FOR THE WICHITA INDIAN TRIBE OF OKLAHOMA, ET AL., PETITIONERS

Pursuant to Rule 24 this Reply and Supplemental Brief will answer certain

allegations made by the Respondents and one of the principal authorities of Petitioners will be a case decided by this Court since this Petition for Certiorari was filed on December 24, 1973.

In the Brief for the Kiowa, Comanche and Apache Tribe of Indians in Opposition at Page 2, Footnote 1, the said Respondent stated that it cannot understand why the Petitioners quote Rule 24 (a) of the Federal Rules of Civil Procedure because the Petitioners cited Lipan Apache v. United States, 22 Ind. Cl. Comm. 1 (1969) as a case of permissive intervention and Petitioners, after re-checking their Petition for Writ of Certiorari together with their Separate Appendix, find that on the first four lines of the middle paragraph on Page 20 of the Petition for Certiorari there appears the statement that the intervention of the Tigua Indian Community was permissive and supported by two cases of the Court of Claims. Your Petitioners also requested in their Petition for Certiorari that this Court read the Lipan opinion in detail, which is set out in the Separate Appendix of the Petitioners to their Petition for Certiorari in Appendix D in the said Separate Appendix at Page 4d and in particular in the last paragraph at the bottom of Page 4d wherein the Indian Claims Commission stated as follows: "Our conclusion to permit intervention is supported by two cases decided by the Court of Claims." Counsel for the Petitioners states that he dictated the middle paragraph at Page 20, which if correctly transcribed, would have read as

follows: "The Lipan Apache opinion stated that intervention for the Tigua Indian Community was permitted and supported by two cases as cited by the Court of Claims, etc." This, of course, is the correct interpretation of the import of Lipan Apache v. United States and no portion or part of the Lipan Apache v. United States decision by the Indian Claims Commission makes any statement concerning permissive intervention. It was grammatically incorrect to have joined permissive and supported together with the conjunction "and" because permissive is an adjective and supported is a verb, but as dictated and if correctly transcribed, the sentence was grammatically correct because permitted is a verb and was joined with another verb, namely, supported, which of course, is grammatically correct.

Your Petitioners state that the Kiowa, Comanche and Apache Tribes, one of the Respondents, in their Brief in Opposition state that Hodgson v. United Mine Workers, 473 F.2d 118 (1972) is not in point because the Petitioners admitted that their intervention was permissive. As heretofore stated, the Petitioners have never implied that the right of the Petitioners to intervene was a permissive intervention and a casual reading of the voluminous Briefs that the Petitioners have filed heretofore before the Indian Claims Commission and before the Court of Claims will verify the statement that the Petitioners do not now and have never in the past stated that their intervention was permissive.

The Petitioners have always stated that their right to intervene should and does fall within Rule 24 of the Federal Rules of Civil Procedure which is the Rule on intervention and in particular paragraph (a) INTERVENTION OF RIGHT. At pages 1a and 2a in said Appendix A attached to this Reply and Supplemental Brief, there appears an Order of the Indian Claims Commission issued on the 16th day of January, 1974, after Petitioners filed their Petition for Certiorari, wherein the Indian Claims Commission again reiterates the procedure that where there is no rule of the Indian Claims Commission that applies, the accepted procedure is to follow the Federal Rules of Civil Procedure which in the particular Order to Show Cause was the adoption of Rule 54 (b) of the Federal Rules of Civil Procedure by the Indian Claims Commission because it does not have an applicable rule of its own. Therefore, the premise that the Federal Rules of Civil Procedure apply when no rules of procedure have been promulgated by the Indian Claims Commission, is a correct and valid premise and the Federal Rule of Civil Procedure for intervention is the governing rule for determination of intervention before the said Indian Claims Commission.

Your Petitioners state that Appendix B attached to this Reply and Supplemental Brief and in particular Pages 1b through 5b inclusive is an excellant summary of the applicable law relative to the timeliness of intervention where intervention is sought as a matter of right and the basic rule is that the amount of

time which has elapsed since the litigation began is not of itself the determinative test of timeliness, but the correct test is that the Court should look to related circumstances, including the purpose for which the intervention is sought, etc. Your Petitioners wish to state that in the Brief in Opposition filed by both Respondents, that is, the Kiowa, Comanche and Apache Tribes of Indians and by the United States, the statement is made that the Indian Claims Commission Act is jurisdictional and if a claim is not brought within the period of time specified in the Act, the claim would be barred and both of the Respondents have given as authority for this premise a decision of this Court styled, "United States ex rel Texas Portland Cement Company v. McCord," 233 U.S. 157. This decision was rendered on April 6, 1914, therefore, it is certainly not a late decision. The limitation phase of said suit pertained to a right of action upon a statutory contractors bond and this Court made the statement that the statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability becomes a part of the right conferred and is jurisdictional.

Your Petitioners, of course, realize that this Court has recently issued an Opinion from which excerpts are set out in Appendix C to your Petitioners Reply and Supplemental Brief and the said Appendix C contains Pages 1c through 6c inclusive. This opinion, of course, was issued on January 16, 1974, after your Petitioners filed their Petition for

Certiorari herein, therefore, for that reason, your Petitioners will discuss the importance of this decision somewhat in detail. Of course, the said case of American Pipe Line Construction Company, et al., v. the State of Utah, et al., 94 S. Ct. 756, 42 LW 4155 was an action for triple damages under the Sherman Act, but Eleven days short of one year after a civil action by the United States to restrain violations of the Sherman Act, Clayton Act and False Claims Act was terminated by a consent decree, the State of Utah commenced a purported class action against the same defendants for treble damages for violation of the first section of the Sherman Act. After ruling that the action could not be maintained as a class action, 49 F.R.D. 17, the United States District Court for the Central District of California, 50 F.R.D. 99, denied applications of previously prospective class members for permission to intervene on the ground that claims of intervenors were barred by limitation. The Court of Appeals reversed, 473 F.2d 580, as to denial of permissive intervention. Certiorari was granted. The Supreme Court, Mr. Justice Stewart, J., held that at least where class action status has been denied solely for failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' commencement of original class suit tolls the running of the limitation statute for all purported members of the class who make timely motion to intervene by permission or as of right after the court has found suit inappropriate for class action.

In the said Appendix C a portion of this decision is set out because it appears to the Petitioners to be very germane and this decision has, as of the present time, received a limited printing and circulation. Those opposing the intervention in said case used as authority The Harrisburg v. Rickards, 119 U.S. 199, which is a case even before the case cited by the Respondents concerning the fact that where the Statute creates a liability, the time within which the suit must be brought operates as a limitation of the liability itself as created. This Court stated that the Harrisburg v. Rickards case does not restrict the Federal Judicial power to delineate circumstances where the applicable Statute of Limitation would be tolled. Your Petitioners believe that this Court, if it applies the same over all reasoning that was applied in American Pipe Line Construction Co. v. Utah, this Court will be able to find that there is no valid reason why the intervention of the Wichita's should not be permitted in this case.

The United States was put on notice within the statutory time to defend a claim for the wrongful taking of aboriginal Indian lands in Western Oklahoma and in the Northern and Western part of Texas, which claim was filed against the United States for the wrongful taking of said lands by the Kiowa, Comanche and Apache Tribes of Indians, one of the Respondents herein, therefore, allowing intervention in said claim by the Wichita's will permit essential fairness and the United States

will not be prejudiced in its defense against said claim after the Wichita intervention. As set out in the Petitioners' Petition for Certiorari, the United States filed its Answer on March 1, 1955, in Docket 257 before the Indian Claims Commission wherein the United States by its pleadings affirmatively stated that it was familiar with the claims of the Wichita Indian Tribe for title to the said aboriginal lands in question. (See Petitioners Petition for Certiorari, Pages 30 through 31 inclusive).

The Court of Claims in its decision rendered on June 20, 1973, reported at 479 F.2d 1369 (1973) for which this Petition for Certiorari was filed, makes an unusual determination that if the Wichita Indians were allowed to intervene, the end result might be that no valid claim would be adjudicated for aboriginal title against the United States for the said lands in question. In other words, the Court of Claims is making a determination and argument in the exact converse of the usual argument for disallowing a late intervention or a late suit after the usual Statute of Limitation has run.

Reiterating, the usual argument for requiring suits or claims to be filed within the normal Statutory period is that if the suits or claims are filed later, the Defendant would be prejudiced and could not defend properly and the Defendant's liability might be increased if claims or interventions were permitted

to be filed late which, of course, is the ordinary and usual argument against a late claim or suit or intervention after the usual time for limitations, but the Court of Claims, apparently, in its desire to fully protect the Kiowa, Comanche and Apache Tribes of Indians even though they had been before the Indian Claims Commission two different times, once in 1957 in Docket 32 when the Respondent, the Kiowa, Comanche and Apache Indians received a net final award of $2,067,166.00 and again in 1968 in the combined Dockets of 258 and 259 wherein the Respondent, the Kiowa, Comanche and Apache Tribes of Indians, received a net final award of $6,000,000.00, stated that it would be unfair to the Kiowa, Comanche and Apache Tribes to allow the Wichita's to intervene at the time they were permitted to intervene by the Indian Claims Commission for the reason that their intervention might result in there being no liability assessed against the United States. It appears to the Petitioners that if the Respondent, the United States, would not be prejudiced by the intervention of the Wichita's at a time after the normal running of the Statutes of Limitations, there should be no valid reason for barring the intervention of the Wichita Indian Tribe and if the premise of the Court of Claims is correct, the liability of the United States might be considerably larger if the Wichita's are not allowed to intervene than it would be if the Wichita's were permitted to intervene.

Your Petitioners believe that the legislative intent and purpose of the Indian Claims Commission Act was to give

all Tribes their day in Court and by the allowing of intervention of the Wichita's herein, the over all legislative intent of Congress for the disposal of Indian claims would be consumated.

Your Petitioners in this penult paragraph of their Reply and Supplemental Brief wish to defend their position taken in their Petition for Certiorari at Page 30 wherein your Petitioners stated that perhaps the Indian Claims Commission had in mind the case of U.S. v. State of La., 1957, 77 S. Ct. 1373, 354 U.S. 515, 1 L. Ed. 2d 1525 when the Indian Claims Commission allowed intervention. This premise was strongly criticized by the Respondent, the Kiowa, Comanche and Apache Tribes in their Brief in Opposition at Page 20. A casual re-examination of this decision by the Court will reiterate that the authority for such ruling was Rule 9 (2) (6) of this Court and Rule 21 of the Federal Rules of Civil Procedure and the general authorative power and equity to order additional parties to be brought in.

Your Petitioners herein again request that a Writ of Certiorari be issued to the Court of Claims in this matter.

Respectfully submitted,

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March 21, 1974

APPENDIX A

33 Ind. Cl. Comm. 51

BEFORE THE INDIAN CLAIMS COMMISSION

LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, ET AL.,	)	
Plaintiffs,	)	Docket No. 363
v.	)	(Second Claim Act of 1904)
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER TO SHOW CAUSE WHY A FINAL JUDGMENT MAY NOT BE ENTERED

On June 30, 1973, the Commission entered an interlocutory order holding the United States liable for the Fifth Amendment takings of reservation lands of plaintiffs, and ordering that the case proceed for the purpose of determining the amount of payments and offsets allowable, if any. A pretrial hearing was held on July 26, 1973. Plaintiffs filed a proposed pretrial order on September 14, 1973, defendant filed a proposed pretrial order on October 23, 1973, and plaintiffs filed a response on October 29, 1973. Defendant submitted into evidence accounting reports and records and both parties submitted proposed findings of fact and final judgments in their proposed pretrial orders.

The parties are in agreement concerning the dates and amounts of payments, and allowable gratuities. The parties are also in agreement that the Commission should direct that a final judgment be entered as to the award covered by this phase of Docket 363, in accordance with Rule 54(b), F.R. Civ. P., relating to multiple claims in a single action. Wherefore,

UPON CONSIDERATION of the parties' proposed pretrial orders, and the response thereto, and the findings of fact and opinion entered this day herein, and being fully advised in the premises,

IT IS HEREBY ORDERED that the parties will have thirty days to show cause why a final award of $8,286,991.54 plus simple interest at five per cent per annum on the principal sum of $1,888,162.46 from January 1, 1974, until paid, should not be entered.

Dated at Washington, D.C., this 16th day of January 1974.

s/s Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

s/s John T. Vance
John T. Vance, Commissioner

s/s Richard W. Yarborough
Richard W. Yarborough, Commissioner

s/s Margaret H. Pierce
Margaret H. Pierce, Commissioner

s/s Brantley Blue
Brantley Blue, Commissioner

APPENDIX B

AN EXCERPT FROM HODGSON V. UNITED MINE WORKERS OF AMERICA, 473 F.2d 118 (1972). THE FOLLOWING EXCERPT FROM THE ABOVE OPINION APPEARS ON PAGES 128 and 129 FROM THE SAID CITATION IN QUESTION.

(16) Having discovered no evidence reflecting a legislative purpose inimical to intervention by union members in the Secretary's suits, we must move on to a consideration of the requirements of Rule 24 (a) (2), especially as they are treated in Trbovich, in order to further evaluate appellants' claim. In the present case, the District Court found the application of appellants as proposed intervenors to be untimely. With all due deference to the court's view on that matter, we must disagree. While timeliness is a prerequisite to any claim for intervention under Rule 24,[64] it is set-

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64. See note 35 which is as follows: Rule 24 provides for intervention either as of right or by permission:
(a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is

(Footnote 64 continued on Page 2 b)

tled-particularly where intervention is sought as of right-that the amount of time which has elapsed since the litigation began is not in itself the determina-

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(Footnote 64 Continued from Page 1b)

> protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its direction the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(a)-(b).

tive test of timeliness.[65] Rather, the court should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicant's rights,[66] and the improbability of prejudice to those already parties in the cas.[67]

(17) To be sure, appellants' application for intervention was made after the action was tried, and some seven years after it was filed. But the proposed intervenors expressly disavowed any desire to reopen any previously-litigated question, and sought only to participate in the remedial, and if necessary the appellate, phases of the case. This limited goal does not appear to impose any untoward burden on the UMWA, the Sec-

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65. Tennessee Coal, Iron & R. Co. v. Muscoda Local 123, 5 F.R.D. 174, 177 (N.D.Ala. 1946).

66. Wolpe v. Poretsky, 79 U.S. App. D.C. 141, 144, 144 F.2d 505, 508, cert. denied, 323 U.S. 777, 65 S. Ct. 190, 89 L.Ed. 621 (1944); 3B J. Moore, Federal Practice § 14.13 (1) at 24-522 (2d ed. (1969).

67. Tennessee Coal, Iron & R. Co. v. Muscoda Local 123, supra note 62, 5 F.R.D. at 177.

retary or the court.[68] Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved.[69] As we declared in Wolpe v. Poretsky,[70] intervention ' . . . may be allowed (even) after a final decree where it is necessary to preserve some right which

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68. See Trbovich v. UMWA, supra note 16, 404 U.S. at 536, 92 S. Ct. 630. Here the union has already been summoned into court by the Secretary to defend the validity of the trusteeships; intervention by appellants would not require any more than that. In terms of assisting in the shaping of relief, appellants clearly offer more of a benefit than burden to the Secretary.

69. Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129, 136, 87 S. Ct. 932, 17 L.Ed. 2d 814 (1967); System Federation No. 91 v. Reed, 180 F.2d 991, 998 (6th Cir. 1950); Wilson v. City of Paducah, 100 F. Supp. 116, 118 (W.D.Ky.1951); 3B J. Moore, Federal Practice § 24.13(1) at 24-527-28 (2d ed. (1969).

70. Supra note 66.

cannot otherwise be protected.'[71] It can hardly be gainsaid that appellants have rights which could be lost irretrievably were intervention not permitted at this time.

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71. 79 U.S.App. D.C. at 144, 144 F.2d at 508.

APPENDIX C

EXCERPTS FROM AMERICAN PIPE AND CONSTRUCTION CO. ET AL., V. STATE OF UTAH, ET AL., 94 S. Ct. 756, DECIDED JANUARY 16, 1974, AND FULLY REPORTED IN 42 LW 4155 through 4163 INCLUSIVE. THIS CASE WAS DECIDED BY THIS COURT SUBSEQUENT TO THE FILING OF THE PETITION FOR CERTIORARI HEREIN.

* * * As the Court stated in Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, statutory limitation periods are 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Id., at 348-349. The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights.' Burnett v. New York Central Railway, 380 U.S. 424, 428, are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine

both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchent, see, e.g., American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972); H. Friendly, Federal Jurisdiction: A General View 118-120 (1973); Handler. The Shift from Substantive to Procedural Innovations in Antitrust Suits-The Twenty-Third Annual Antitrust Review, 71 Col. L. Rev. 1, 5-12 (1971); Handler, Twenty-Fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 34-42 (1972), this interpretation of the Rule is nontheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve.

III

The petitioners contend, however, that irrespective of the policies inherent in Rule 23 and in statutes of limitations, the federal courts are powerless to extend

the limitation period beyond the period set by Congress because that period is a 'substantive' element of the right conferred on antitrust plaintiffs and cannot be extended or restricted by judicial decision or by court rule. Unlike the situation where Congress has been silent as to the period within which federal rights must be asserted, in the antitrust field Congress has specified a precise limitation period, and further has provided for a tolling period in the event that government litigation is instituted. The inclusion of the limit and the tolling period, the petitioners assert, makes the 'substantive' statute immune from extension by 'procedural' rules. They rely in large part on the Court's decision in The Harrisburg v. Rickards, 119 U.S. 199, in which it was stated, with respect to state wrongful death statutes.

> 'The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.' Id., at 214.

In The Harrisburg, however, the Court dealt with a situation where a plaintiff who was invoking the maritime jurisdiction of a federal court sought relief under a state statute providing for substantive liability. The Court held that when a litigant in a federal court asserted a cause of action based upon a state statute

he was bound by the limitation period contained within that Statute rather than by a federal time limit. Cf. Guaranty Trust Co. v. York, 326 U.S. 99. But the Court in The Harrisburg did not purport to define or restrict federal judicial power to delineate circumstances where the applicable statute of limitations would be tolled. As we said in Burnett, supra, 'While the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled.' 380 U.S. at 427 n. 2. The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme.

In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground. In Burnett v. New York Central R. Co., supra, a railroad employee claiming rights under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., initially brought suit in a state court within the three-year time limitation specifically imposed by § 56 of the Act. The state proceeding was subsequently dismissed because of improper venue. Immediately after the dismissal, but also after the running of

the limitation period, the employee attempted to bring suit in federal court. Reversing determinations of the District Court and the Court of Appeals that the federal suit was time barred, the Court held that the commencement of the state suit fulfilled the policies of repose and certainty inherent in the limitations provisions and tolled the running of the period. See also Herb v. Pitcairn, 325 U.S. 77.

Similarly, in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, or because of fraudulent concealment, Holmberg v. Armbrecht, 327 U.S. 392, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant. In Glus, supra, the Court specifically rejected a contention by the defendant that when the time limitation is an integral part of a new cause of action . . . that cause is irretrievably lost at the end of the statutory period. 359 U.S., at 232. To the contrary, the Court found that the strict command of the limitation period provided in the federal statute was to be suspended by consideration '(d) eeply rooted in our jurisprudence.' Ibid.

These cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution

of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

(footnotes omitted)